Petition

81-172

No.

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES EUGENE PERRY,

Petitioner,

v.

STATE OF MARYLAND

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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QUESTION PRESENTED

Were Petitioner's constitutional rights to due process of law violated by the harassment and the unreasonable and unfair prosecutorial delay between the time the State obtained sufficient evidence to charge Petitioner with the commission of the crimes and the return of the indictment?

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	5
CONCLUSION	7

TABLE OF AUTHORITIES

Cases

Barker v. Wingo, 407 U.S. 514 (1972)	7
Coffey v. State, 585 P.2d 514 (Alaska 1978)	8
Commonwealth v. Cluck, 381 A.2d 472 (Pa. 1977)	8
Commonwealth v. West, 396 A.2d 380 (Pa. 1978)	8
People v. Bryant, 434 N.Y.S.2d 558 (1980)	8
People v. Gulley, 404 N.E.2d 1077 (Ill. 1980)	8
People v. Lawson, 367 N.E.2d 1244 (Ill. 1977)	8
People v. Singer, 405 N.Y.S.2d 17 (1978)	8
People v. Staley, 396 N.Y.S.2d 339 (1977)	8
Rochin v. California, 342 U.S. 165 (1952)	10
Smith v. United States, 414 A.2d 1189 (D.C. App. 1980)	8
State v. Duran, 581 P.2d 19 (N. Mex. 1978)	8
State v. English, 594 P.2d 1069 (Haw. 1978)	8
State ex rel. Leonard v. Hey, 269 S.E.2d 394 (W. Va. 1980)	9
United States v. Avalos, 541 F.2d 1100 (5th Cir. 1976)	6
United States v. Byrum, 540 F.2d 833 (5th Cir. 1976)	6

PAGE

United States v. Elsbery, 602 F.2d 1054 (2nd Cir. 1979) 6

United States v. Erickson, 472 F.2d 505 (9th Cir. 1973) 6

United States v. Farris, 614 F.2d 634 (9th Cir. 1980) 6

United States v. Glist, 594 F.2d 1374 (10th Cir. 1979) 6

United States v. Jackson, 504 F.2d 337 (8th Cir. 1974) 6

United States v. Kopel, 552 F.2d 1265 (7th Cir. 1977) 6

United States v. Lovasco, 431 U.S. 783 (1977) *passim*

United States v. Marion, 404 U.S. 307 (1971) *passim*

United States v. Mays, 549 F.2d 670 (9th Cir. 1977) 6

United States v. Page, 544 F.2d 982 (8th Cir. 1976) 6

United States v. Rice, 550 F.2d 1364 (5th Cir. 1977) 6

United States v. Roberts, 548 F.2d 665 (6th Cir. 1977) 6

United States v. Rubin, 609 F.2d 51 (2d Cir. 1979) 6

No.

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CHARLES EUGENE PERRY,

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v.

STATE OF MARYLAND

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

OPINIONS BELOW

Petitioner was convicted of breaking and entering a storehouse with intent to commit a felony and theft of property of a value in excess of $100.00 (grand larcenty) and theft of a motor vehicle at a court trial in the Circuit Court of Anne Arundel County, Maryland, and sentenced to two concurrent three-year periods. These convictions were affirmed in an unreported per curiam opinion of the Court of Special Appeals of Maryland filed on February 10, 1981 (App. B). The Court of Appeals of Maryland denied Petitioner's Petition for Writ of Certiorari by Order Dated May 27, 1981 (App. C).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1257(3) and Supreme Court Rule 17.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment 5

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was convicted under two indictments charging the theft of a motor vehicle and the breaking and entering of and theft from the Grand Ritchie Liquor Store, both events occurring on January 31, 1976.

It was shown at the pretrial hearing that the Anne

Arundel County police obtained a detailed tape-recorded statement from David Perry (Petitioner's brother) on October 12, 1977, concerning the theft of a motor vehicle which was used to transport a safe taken from the Grand Ritchie Liquor Store. David Perry described how he and Petitioner had taken this car (a 1964 Buick) which was parked on an apartment lot, drove it to the liquor store, broke, in, carried out the safe and took it to the basement of David Perry's home, where it was opened and the $4,400 contents were divided; the empty safe was then thrown into Curtis Creek. David Perry also detailed the purchases he said he and Petitioner made with the proceeds. As a result of the information the police obtained from David, they contacted various agencies, businesses, and persons to investigate Petitioner's income and purchases in January-February 1976, his whereabouts (David said Petitioner used part of his money for a family trip to Disneyworld), and obtained a search and seizure warrant for his home (which led to the institution of unrelated charges against Petitioner in Anne Arundel County District Court for possession of a chain saw with altered serial number on or about November 5, 1977 and federal charges of possession of firearms (hunting rifles) after conviction of a felony). All of these investigative actions took place or were completed by early November 1977.

Around January 1978 the police decided to "lay off (the case) for a while, sit it on the back burner, and leave it sit there and see what happens." Later, when the police learned that other charges against Petitioner in other jurisdictions had "went down the drain" and it did not look like "the man's (Petitioner) going to be going any place," they decided to institute these charges on the evidence previously secured. The primary investigating officer said he did not believe the sentence Petitioner received on the federal charges was normal for the amount of charges brought against him.

On December 4, 1978, the same investigating officer applied for an arrest warrant and swore out these charges utilizing the same information available in early November 1977. Petitioner was arrested on December 6, 1978. The police forwarded their report to the State's Attorney on December 12, 1978, and the indictments were handed down on January 8, 1979.

At the trial the State utilized the testimony of David Perry's former wife, Katherine Perry, to corroborate David Perry's account. The police were aware of Katherine Perry's identity from the beginning of the investigation through many conversations with David Perry, who had admitted to 120-150 burglaries in Anne Arundel County and elsewhere. The police talked with Katherine concerning these charges on December 6, 1978 — two days after the police applied for the arrest warrant in the charging document.

Petitioner and his wife were unsuccessful in obtaining any school, employment, plane, hotel, or telephone records to account for the exact dates of their trip to Disneyworld in January or February 1976. Petitioner knew he and his family visited Florida in late January 1976 but had no other way to show his whereabouts at the time of the crime (January 31, 1976) unless he could produce such records.

The federal question presented for review in this Petition was first raised by preliminary motion to dismiss for lack of a speedy indictment in the trial, which was heard pretrial on May 25 and June 6 and 8, 1979. In an oral opinion, the motion was denied by the Circuit Court for Anne Arundel County, Maryland, following the hearing on June 8, 1979 (App. A). It was raised as Argument I in Petitioner's appeal to the Court of Special Appeals of Maryland, which rejected the argument in its written opinion (App. B). It was further included in the Petition

for Certiorari to the Court of Appeals of Maryland, Argument I, which was denied on May 27, 1981 (App. C).

REASONS FOR GRANTING THE PETITION

This case presents the opportunity to delineate the due process rights of a defendant faced with an unreasonable pre-indictment delay, activated by unfair, deliberate, and oppressive state prosecutorial harassment causing substantial prejudice to the presentation of the defense. Such due process rights were first specifically recognized by this Court in *United States v. Marion,* 404 U.S. 307 (1971), analyzed and applied in many federal and state court decisions thereafter, and further explicated in the context of a good-faith investigative delay in *United States v. Lovasco,* 431 U.S. 783 (1977).

Where *United States v. Marion, supra,* established the due process right to a speedy indictment and *United States v. Lovasco, supra,* examined the justification for an unreasonable delay causing actual or substantial prejudice, this case would carry the analysis one step further in a situation where the petitioner was subjected to prosecutorial harassment, without any elements of justification for the unreasonable and unfair prosecutorial delay which caused substantial prejudice to his defense.

The Maryland court adopted a rigid test in the opinion in this case, requiring that a defendant show both actual prejudice and "unreasonable, deliberate and oppressive" prosecutorial delay. In disposing of Petitioner's claim, the Court of Special Appeals of Maryland further required that a defendant could only demonstrate actual prejudice by showing how missing or lost evidence could have "positively" and "absolutely" been of value to his defense (8a).

(a) In adopting and applying a rigid and absolute "two prong" test, the decision of the Maryland appellate courts

directly conflicts with decisions of various federal courts of appeal.

Ever since this Court handed down the decision in *United States v. Marion, supra,* the federal courts of appeal have attempted to determine if *Marion* required a disjuctive or conjunctive interpretation (*i.e.,* that either "substantial prejudice to appellee's rights" or delay used as "an intentional device to gain a tactical advantage" or "to harass him" was sufficient to establish a denial of due process of law sufficient to warrant dismissal, or that a showing of both elements was necessary).

Illustrative cases adopting the disjunctive approach are *United States v. Jackson,* 504 F.2d 337 (8th Cir. 1974); *United States v. Erickson,* 472 F.2d 505 (9th Cir. 1973); *United States v. Farris,* 614 F.2d 634 (9th Cir. 1980); *United States v. Glist,* 594 F.2d 1374 (10th Cir. 1979). Other circuits, probably representing the majority, have adhered to the conjunctive: *United States v. Kopel,* 552 F.2d 1265 (7th Cir. 1977); *United States v. Roberts,* 548 F.2d 665 (6th Cir. 1977); *United States v. Elsbery,* 602 F.2d 1054 (2d Cir. 1979); *United States v. Rubin,* 609 F.2d 51 (2d Cir. 1979).

The question is not, however, always so clear-cut because (1) there is often an inconsistency within the circuit (*compare United States v. Byrum,* 540 F.2d 833 (5th Cir. 1976), *with United States v. Rice,* 550 F.2d 1364 (5th Cir. 1977), and *United States v. Avalos,* 541 F.2d 1100 (5th Cir. 1976)); (2) the views of the circuit may change in light of extremes in the evidence presented or good-faith justification offered for the delay; and (3) the evolution of a third alternative — the balancing test — thus avoiding a strict or rigid application of either the conjunctive or disjunctive interpretation of *Marion. See United States v. Mays,* 549 F.2d 670 (9th Cir. 1977); *United States v. Page,* 544 F.2d 982 (8th Cir. 1976): This approach was in fact

suggested in *United States v. Lovasco, supra,* 431 U.S. at 790; and *United States v. Marion, supra,* 404 U.S. at 325. Most of the Courts adopting this approach require some threshold showing of prejudice.

The rigid test applied in this case by the Maryland Court of Special Appeals is at odds both with those decisions of the federal circuit courts adhering to the disjunctive approach and with those which have evolved some form of a balancing test (patterned after the approach adopted in *Barker v. Wingo,* 407 U.S. 514 (1972), but utilizing, of course, different elements).

It is submitted that the factual situation in this case presents a ready vehicle for resolving these conflicts in application of the basic test in *Marion* with the various courts of appeal.

(b) It is not surprising that there is a similar division of authority between the state courts of last resort in their interpretation and application of the due process principles of *United States v. Marion, supra;* and *United States v. Lovasco, supra.* Nor is it always a simple question of whether *Marion* mandates a disjunctive or conjunctive application of the factors of (1) substantial prejudice and (2) state caused delay used as an intentional device to gain a tactical advantage. A majority of the state courts of last resort which have considered this question have adopted a strict two prong or conjunctive approach; requiring a showing of both by the accused. Other state courts however, have applied a balancing test between the prejudice to the accused and the reason or justification advanced by the state for the delay or have applied this balancing test after a threshold showing of either one of the elements. Some state courts have adopted a variation of these tests; either emphasizing one of the factors to the exclusion of the other or varying the language or the applicable test altogether.

The strict conjunctive approach of the Maryland court conflicts most dramatically with those state courts of last resort which have adopted a simple balancing test-weighing the prejudice to the accused against the reasonableness or justification advanced by the state after undue preindictment delay has been shown. See *State v. English*, 594 P.2d 1069 (Haw. 1978); *Coffey v. State*, 585 P.2d 514 (Alaska 1978). The Pennsylvania court applies the balancing test after the defendant has shown "some prejudice" *Commonwealth v. Cluck*, 381 A.2d 472 (Pa. 1977), or the "possibility of prejudice" *Commonwealth v. West*, 396 A.2d 380 (Pa. 1978).

Some states indicate that a balancing process must be applied after the defendant has shown actual prejudice, *State v. Duran*, 581 P.2d 19 (N. Mex. 1978) or "demonstrable prejudice" *Smith v. United States*, 414 A.2d 1189 (D.C. App. 1980). The Illinois court applies a shifting burden test — the defendant has the burden to show actual prejudice, if he does, the burden shifts to the state to show any reason or justification for the delay and then the two are balanced. *People v. Lawson*, 367 N.E.2d 1244 (Ill. 1977); *People v. Gulley*, 404 N.E.2d 1077 (Ill. 1980) (the latter case stating that prejudice may be presumed where there is delay of extreme proportion).

One of the broadest applications of the rule is in New York, which in a series of cases — *People v. Staley*, 396 N.Y.S.2d 339 (1977); *People v. Singer*, 405 N.Y.S.2d 17 (1978) and *People v. Bryant*, 434 N.Y.S.2d 558 (1980) — held that the failure to conduct a prompt prosecution in a proper case may require dismissal of an indictment even in the absence of prejudice to the accused. Under these decisions, where the delay is unexplained or inexcusable, preindictment and postindictment delay may be joined and a due process test applied to the total period.

The West Virginia court has held that extreme periods of delay may constitute prima facie evidence of prejudice (or presumptive prejudice), that the balancing test is not a proper due process approach and that the government has the burden to proceed with reasonable diligence. *State ex rel. Leonard v. Hey*, 269 S.E.2d 394 (W. Va. 1980).

This brief review of some decisions of state courts of last resort demonstrates a wide variety in the application of the principles of *United States v. Marion, supra*, and the due process test for preindictment delay. The decision of the Maryland court of last resort, requiring a positive and absolute showing of both actual prejudice and unreasonable, oppressive and deliberate state action by the defendant clearly conflicts with the above mentioned decisions of other state courts of last resort on this federal question.

(c) The application of the test for the dismissal of the indictment for unreasonable pre-indictment delay by the Court of Special Appeals of Maryland is at variance with the decision of this Court in *United States v. Marion, supra*, and *United States v. Lovasco, supra*.

The Maryland court (as do many others) has, in fact, substituted a requirement of *actual* prejudice for the *substantial* prejudice required in *Marion* and has adopted its own language of "unreasonable, deliberate and oppressive" delay in place of *Marion's* concept of delay as an intentional device to gain a tactical advantage or to harass him. As noted, many other courts have utilized varying descriptive phrases — all aimed at assuring the accused basic fairness by the government at all stages of the prosecution. It must also be remembered that the oft-quoted test in *Marion* was actually a summation of the concession made by the government in that case and was not a direct holding of this Court.

In reviewing the principles of *Marion*, this Court, in *Lovasco*, adopted a modified balancing test, stating:

> Thus *Marion* makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.

431 U.S. at 790.

The Maryland court required that Petitioner do more than demonstrate the prejudice to him accruing from the unreasonable delay of some 14 months, saying that since he could not "absolutely" and "positively" state whether the unavailable evidence (records establishing exactly when he and his family had visited Florida around the time of the crime) could have been of value to his defense, he failed to demonstrate actual prejudice. No mention of fundamental fairness or a "delicate judgment based on the circumstances of each case" (401 U.S. at 325) was made.

Furthermore, using the evidence and leads supplied by Petitioner's brother in October, 1977, the state, through the chief investigating police officer, obtained a search warrant, instituted an action in Anne Arundel County, forwarded evidence obtained in the search to at least one other jurisdiction and then, a year later, when the same officer learned that Petitioner was not going to jail and did not receive what that officer felt was sufficient punishment on the other charges, these charges were instituted, without any new evidence having been obtained. These facts alone demonstrate extreme, oppressive and unreasonable harassment, violating "the community's sense of fair play and decency" *Rochin v. California,* 342 U.S. 165, 173 (1952), quoted with approval in *United States v. Lovasco,* 431 U.S. at 790.

It is submitted that where, as here, the accused shows some prejudice (the loss of records establishing his whereabouts at the time of the crime), an unreasonable delay in returning the indictment (14 months) after the prosecution

obtains all necessary evidence to support an indictment, blatant overreaching and harassment ("sitting the charges on the back burner" until some member of the prosecution team reaches the conclusion that the accused has not been properly punished on charges arising in other jurisdictions), and a complete lack of any good-faith investigative delay or other justification, the court must exercise "a delicate judgment" "to accommodate the sound administration of justice to the rights of the defendant to a fair trial" (401 U.S. at 325).

In short, where some prejudice is shown and there is blatant and extreme harassment, this Court should direct the lower courts, both state and federal, to balance the degree of prejudice and harassment against the reasons given by the prosecution for the delay. Just as *Lovasco* found that a goodfaith investigative delay could outweigh the prejudice suffered by the accused, the extreme harassment and lack of fundamental justice in this case outweighs the reasons for the delay given by the prosecution.

The Court of Special Appeals of Maryland ignored this aspect of the teachings of *Marion* and *Lovasco* and did not attempt to balance the respective interests of the parties.

CONCLUSION

The petition for a writ of certiorari to the Court of Special Appeals of Maryland should be granted.

Respectfully submitted,

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APPENDIX A

Oral Opinion of Circuit Court for Anne Arundel County on Motion to Dismiss for Lack of Speedy Indictment.

Hearing held May 25, June 6 and 8, 1979.

Extract of Opinion of Chief Judge Childs:

(The Court) All right. The first matter that the Court must dispose of is the motion concerning a preindictment delay. I think the entire line of cases which deal with this matter have their derivation in *United States v. Marion,* 404 U.S. 307. That case, essentially, recognized the proposition that the matter of statute of limitations generally sets the time for pre-indictment delay. In other words, what they stated was that if the statute of limitations had not run at the time of the indictment then there could be no Fifth or Sixth Amendment prohibition to the bringing of a indictment and later on that was amended and apparently a number of cases have said that there can be a matter of a speedy indictment complaint when there has been a showing of actual prejudice and intentional delay, actual prejudice being to the Defendant and intentional delay on the part of the prosecuting branch of the case and, therefore, it is the Court's finding that the cases which have dealt with it in the Court of Special Appeals at least, *Dorsey v. State, Blake v. State, State v. Hamilton,* are the precedents which this Court is required to follow even though there has been a Federal case which was *United States v. Wilson,* 357 F. Supp. 619, wherein it was said that an unexplained sixteen months delay, coupled with a loss of a potential defense witness during that time was held sufficient to dismiss the indictment. Now, the Court has tried to weigh the evidence which I've heard as opposed to — and apply it to the concepts of law which the Court believes applicable. The Court finds that there has been no showing of actual prejudice compared to possible prejudice. There has been a

showing of certainly of possible prejudice to the Defendant in that, of course, memories dim and people can't remember but apparently, the two principal items of possible prejudice testified to by the Defendant in this case was, number one, he had to move and, therefore, his records which might have, not would have, but might have, shown that he was away from the County at the time of the actual commission of the acts complained of in these two cases, that he would be able to show through these travel records which his wife apparently had disposed of in the course of the moving, might have shown that he was away and he could, therefore, pick up the thread of his whereabouts which he no longer remembered and that these records would assist him in that regard, there is no definite, specific assurance the records ever did exist, although they certainly could have, but there was definite statement that, by the Defendant and his wife both, that the records were lost or destroyed during the move and, therefore, could not be located, and still that is only a possibility of actual ability to show that he was elsewhere and no definite or tangible material to indicate that he was either in Florida or here at the time of the commission of the crimes charged. He also stated that Detective Mitchell's procedures in arresting him at his father-in-law's place of business constituted harassment, especially in view of the fact that a salesman for Crown Central, I believe it was, was present one time when he was arrested, therefore, that would preclude Crown Central from ever permitting him to — or him and his wife to assume his father-in-law's franchise on the Crown Central Station which the father-in-law operated and which Mr. Perry managed. At the same time it was shown, however, that he had been convicted of burglary in 1965 in Baltimore County, of robbery in 1962 in Anne Arundel County, burglary in 1966 in Baltimore County, burglary in 1970 in Baltimore County, bank larceny in 1970 in Federal Court and a firearm conviction in 1978 as a convicted felon. Now, with a record such as that, even assuming that Crown Central would be concerned or even inclined to permit him to take over the franchise, and there was no evidence that

that would be the case, but even assuming that they were inclined to do so, and could be turned away by Detective Mitchell's arresting Mr. Perry at the place of business, certainly that one arrest and that was only arrest, it was not a conviction, could not possibly, in the Court's opinion, amount to the overwhelming criminal background of Mr. Perry, were Crown Central to be concerned about this and even considering transferring the franchise to Mr. Perry or his wife, there was no testimony that that was definitely the situation, no-one was produced from Crown Central to explain their policy in that particular regard and so the Court is only led to speculate as to whether or not that constituted any prejudice whatsoever. There was no-one produced from Crown Central, the salesman wasn't produced, the policy of the company was not produced and the Supreme Court, according to *Dorsey v. State,* has recognized absence a showing of actual prejudice compared to possible prejudice, the applicable statute of limitations is usually observed, usually considered the primary guarantee against bringing overly stale criminal charges. So, insofar as actual prejudice is concerned, the Court feels that only possible prejudice has been shown, so that leads us to the other phase and that is undue harassment by the State in delaying the charges. The delay is not nearly as long as the one which was set out, I believe, in *Marion.* In this case it was some eleven months, apparently, between the time that the State is alleged to have had sufficient information to have brought the charge and the actual arrest of the Defendant on these two particular charges. It was shown that at the time that this information was at hand, that the Defendant in this case was under suspicion of at least 150 separate charges, not only in Anne Arundel County, but in Fairfax County, Hampton, Virginia, Baltimore County, Delaware, Montgomery County, Prince George's County and to single out the fact that Detective Mitchell may have desired to harass Mr. Perry for his own reasons, I think is not justified under the facts of the overwhelming number of cases which were then pending and either disposed of or in the process of being investi-

gated. Detective Mitchell testified that he was taken off this partiuclar case. The Court does not recall the exact reason for it, but the Court is aware that it is not at all unusual when multiple charges are pending against a particular individual, especially when the possibility is present that one charged with crime in another jurisdiction is likely to be extradited to that other jurisdiction and tried there and sentenced there to a long prison term, it is found to be expeditious and in fact to be economical on the part of the State, not to press the prosecution in this jurisdiction, but to allow the charges to be pursued in the other jurisdictions in order that in the event of conviction, a long sentence might be imposed elsewhere, it would be futile and uneconomical, to go through the expense and the effort involved in trial locally, simply to secure a conviction, the sentence for which might never be carried out because of the matter of the sentence to be served elsewhere, and, therefore, the Court finds that it is not an unusual practice to cease work on a particular criminal case pending the outcome and the decision of authorities in other jurisdictions, and when it became apparent that no particular sentence was being imposed elsewhere, I believe there was one Federal work release program to which the Defendant was sentenced for approximately six months, and returned here, but nothing was being done in the adjoining states which apparently were also interested in this Defendant's progress, for the State to then pick up the pieces and to continue and, therefore, this Court finds that neither prong has been satisfied by the proof offered by the Defendant and, therefore, the motion for dismissal for lack of speedy indictment is denied.

APPENDIX B

Unreported

In The Court of Special Appeals of Maryland

No. 684

September Term, 1980

Charles Eugene Perry

v.

State of Maryland

Liss, MacDaniel, Weant, Judges

Per Curiam

Filed: February 10, 1981

Following a court trial in the Circuit Court for Anne Arundel County, the appellant Charles Eugene Perry was convicted of theft of a motor vehicle, breaking and entering a storehouse with the intent to commit a felony therein, and theft of property, the total value of which exceeded $100.00. Consequently, the appellant was committed to the custody of the Commissioner of Correction

for two concurrent three year periods. Believing himself to have been wronged by various actions of the court below, Mr. Perry has noted an appeal to this forum. In so doing the argues as follows:

> I. The delay by the State in proceeding with charges against [Appellant] under both indictments deprived him of his constitutional right to due process of law and, under the facts of these cases, warrants dismissal of the indictments.
>
> II. The testimony of the immunized principal-accomplice, David Perry, was not sufficiently corroborated to support the conviction.
>
> III. The testimony of the corroborating witness (Katherine Perry, the former wife of the principal-accomplice) was not admissible in that the State improperly led and prompted the recollection of the witness as to the most significant aspects of her testimony.
>
> IV. The trial court erred in permitting the State to introduce evidence of other crimes allegedly charged against Appellant in other jurisdictions without a proper foundation and through questioning of Appellant's wife, when Appellant did not testify on his own behalf.

Finding ourselves unable to agree with any of the appellant's contentions, we shall affirm the judgments of the Circuit Court for Anne Arundel County. For the sake of clarity, as well as brevity, we shall recite the relevant facts only where such are necessary to the discussion of a particular issue.

I.

As recently as May of last year, this Court reiterated the test to be applied when an appellant asserts that he has been deprived of his constitutional right to due process of the law as a result of an undue pre-indictment delay. We said at pages 574-75 of *State v. Temoney*, 45 Md. App.

569 (1980) (quoting *Dorsey v. State*, 34 Md. App. 525, 537-38, *cert. denied*, 280 Md. 730 (1977)):

> "Where a defendant can demonstrate actual prejudice . . . in circumstances where the delay between the occurrence of the criminal offense and the date of arrest or indictment is unduly long and the actions of the State in delaying were unreasonable, deliberate and oppressive, the due process clause would demand a dismissal of the indictment. [Citations omitted]."

Despite Mr. Perry's arguments to the contrary, we do not find that the cases cited by him, *e.g.*, *United States v. Marion*, 404 U.S. 307 (1971) and *United States v. Lovasco*, 431 U.S. 783 (1977) warrant deviation from the *Dorsey* test. If anything, these cases bolster our determination that *Dorsey* is properly applicable herein.

In *Marion, supra*, the Supreme Court noted that while "the [applicable] statute of limitations does not fully define [a person's] rights with respect to the events occurring prior to indictment," 404 U.S. at 324, it nevertheless is "'the primary guarantee against [the] bringing of overly stale criminal charges.'" *Id.* at 322 (quoting *United States v. Ewell*, 386 U.S. 116, 122 (1966)). For the secondary guarantee, the due process clause of the fifth amendment, to trigger dismissal, there must be a showing of those factors referred to in *Dorsey, i.e.*, substantial actual prejudice as the result of a delay, said delay being intentionally devised to gain a tactical advantage over the appellant. *Id.* at 324.

Lovasco, supra, not only reaffirmed *Marion*, but shed further light on the factors set out therein. As to the requirement of actual prejudice, Justice Marshall, speaking for the majority of the Court said at page 789 that "proof of actual prejudice makes a due process claim concrete and ripe for adjudication, not . . . automatically valid." Continuing in this vein he stated that *Marion* made clear that while "proof of prejudice is generally a necessary" element, it may well prove to be an insufficient one when the due process inquiry is considered in the light of the reasons for delay. *Id.* at 790.

It is obvious from the above-recited principles that in order for Mr. Perry to succeed in his argument that the statutorily permissible fourteen month delay complained of was such that it deprived him of due process of the law, he must show that it caused him actual prejudice and that it was unreasonable, deliberate, and oppressive. While we find that the delay in question suffers from neither of these infirmities, we need only speak to the issue of actual prejudice in order to dispose of the appellant's argument.

When questioned as to how he was actually prejudiced by the allegedly undue delay, Mr. Perry conceded that he "had no way of knowing" whether the evidence he would have been able to produce had the delay not been as lengthy "could positively, absolutely" have been of value in his defense. In the absence of this inability to demonstrate actual prejudice, as compared to possible prejudice, we cannot say that dismissal of the charges was warranted in the instant case. *Dorsey*, 34 Md. App. at 537-38.

II.

In *Jeandell v. State*, 34 Md. App. 108 (1976), this Court stated at page 109:

> As to the quality and nature of non-accomplice testimony sufficient to corroborate the testimony of accomplices, the law was well stated in *Foxwell v. State*, 13 Md. App. 37, at 39:
>
> > Although only slight corroboration is necessary, the corroborative testimony must tend either: (1) to identify the defendant with the perpetrators of the crime, or; (2) to show the defendant's participation in the crime itself. *Spies v. State*, 8 Md. App. 160, 162. . . .

It is the appellant's contention that the non-accomplice testimony of his ex-sister-in-law Katherine Perry fails, as did the non-accomplice testimony in *Jeandell*, to meet the standard set out above. We disagree.

As we pointed out in *Jeandell,* "[a]ll . . . that the corroborating testimony did was place the appellant in the company of the accomplices at a time which could have been as much as 34½ hours removed from the time of the perpetration of the crime. . . ." *Id.* at 112. Admittedly, the testimony of Katherine Perry leaves much to be desired in terms of consistency and clarity. On the other hand, at the close of Ms. Perry's examination by counsel, the trial court asked several questions of her so as to remove the confusion generated by her earlier responses. We find that the evidence elicited in this regard constitutes the necessary "slight corroboration" demanded by *Foxwell* and its progeny.

As to the appellant's question whether or not Katherine Perry was an accomplice, we recognize it for what it is, an afterthought, and thus will treat it accordingly, *i.e.,* without further comment.

III.

At the trial below, the court overruled the appellant's counsel's objection to a question wherein the State's Attorney called Katherine Perry's attention to a date of which she had no independent recollection, *i.e.,* the date on which the charged thefts allegedly occurred. Faced with a similar situation in the case of *McCree v. State,* 33 Md. App. 82 (1976), this Court found "absolutely no abuse of discretion in the trial judge in permitting the State so to focus the attention of the witnesses. . . ." *Id.* at 97 (citation omitted). Mr. Perry's argument to the contrary has failed to convince us that the holding of *McCree* is inapplicable in the case *sub judice.*

IV.

> The reception or rejection of evidence particularly on cross-examination is, and for very practical reasons, must be in the discretion of the trial judge. *Long v. State,* 7 Md. App. 256 . . . and *Burley v. State,* 5 Md. App. 469. . . . The cross-examination may be broad enough to permit any question which reason-

> ably tends to explain, contradict or discredit the witness or which tends to test his accuracy, memory, veracity, character or credibility. *DeLilly v. State,* 11 Md. App. 676. . . . As pointed out in that case, however, discretion in the trial judge is not unlimited. It should also be noted that the reception or rejection of improper evidence is not reversible error unless there is demonstrable prejudice. *Barger v. State,* 2 Md. App. 565 . . ., *Duncan v. State,* 5 Md. App. 440 . . .; see *Santoni v. State,* 5 Md. App. 609. . . .

Williams v. State, 15 Md. App. 320, 327-28 (1972). Our review of the record convinces us that the challenged evidence was properly admitted for the stated, limited purpose of impeaching the witness. Assuming arguendo that the trial court erred in allowing the introduction of such, we find the error to be harmless, especially since this case was tried without a jury. *Burris v. State,* 44 Md. App. 704 (1980).

Judgments Affirmed.
Costs to be paid by the Appellant.

APPENDIX C

In The Court of Appeals of Maryland

Petition Docket No. 45

September Term, 1981

(No. 684, September Term, 1980 Court of Special Appeals)

Charles Eugene Perry

v.

State of Maryland

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy,
Chief Judge.

Date: May 27, 1981.